

89-363

① Supreme Court, U.S.

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CLERK

NO.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1989

FADEL SMILE,

Petitioner,

v.

STATE OF TENNESSEE,

Respondent.

WRIT OF CERTIORARI
TO THE SUPREME COURT OF TENNESSEE

PETITION FOR WRIT OF CERTIORARI

Bob McD. Green
204 East Unaka Avenue
Johnson City, TN 37601
(615) 928-6551
Counsel of Record

John T. Milburn Rogers
100 South Main Street
Greenville, TN 37743
(615) 639-5183
Of Counsel

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QUESTION PRESENTED FOR REVIEW

Does the due process clause of the fourteenth amendment to the United States Constitution prohibit the conviction of a defendant solely on the basis of uncorroborated accomplice testimony where no cautionary instructions are given to the jury regarding the unreliability of such testimony?

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OPINIONS BELOW

The decision of the Tennessee Court of Criminal Appeals was rendered on May 2, 1989, and is set forth in the Appendix at A-2. The decision of the Supreme Court of Tennessee denying review is at A-1.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a). The final disposition of this case below was the denial of application for review filed by the Supreme Court of Tennessee on July 3, 1989 (A-1).

CONSTITUTIONAL PROVISIONS INVOLVED

The fifth amendment to the United States Constitution states in pertinent part:

No person . . . shall be deprived of life, liberty, or property, without due process of law[.]

The fourteenth amendment states in part:

nor shall any state deprive any person of life, liberty, or property without due process of law[.]

STATEMENT OF THE CASE

The Petitioner, Fadel Smile, was indicted by the state of Tennessee on December 29, 1986, on the charge of being an accessory after the fact to a bank robbery which occurred nearly 22 months earlier on March 5, 1985, in Bristol, Tennessee. The robbery was committed by Donald Bradley, with the assistance of Kimberly Dawn Hutton, each of whom confessed to their participation. The in-

vestigation of Smile's involvement in the robbery began after Hutton pleaded guilty in federal court to aiding and abetting the robbery about a year after it occurred and accused Smile of driving Bradley and herself to a motel shortly after the robbery. According to Hutton, Smile knew when he drove them to the motel that they had committed the robbery and accepted \$400 for his services.

At trial, the state's entire case rested on the testimony of Hutton; no corroborating evidence linked Smile to any criminal activity, and Bradley did not testify. Hutton stated at trial that she drove Bradley to the Twin City Federal Savings and Loan in Bristol after she had stolen a gun for Bradley from one of her friends. Bradley entered the bank

alone, procured almost \$14,000, and returned to the car, at which time Hutton drove him to his grandfather's house. Bradley then allegedly called Smile, who drove Hutton and Bradley to a motel in Abington, Virginia, in his blue Nova. The state introduced evidence in the form of a motel registration slip signed by Hutton showing that Hutton registered for a party of two under her name, and showing that she was driving a 1972 Volkswagen. Also, evidence was introduced of two long distance telephone calls from the motel to Smile's home telephone. Hutton concluded her testimony by admitting that she was very bitter towards Bradley and his friends.

Smile testified in his behalf that he was acquainted with Bradley and

Hutton, and that he had on several occasions given them rides to various places, including Abington, because Bradley did not drive. Although acknowledging that he had driven them to Abington several times, Smile denied having ever done so with the knowledge that Bradley had robbed a bank, and denied having been paid \$400 by Bradley on any occasion. Smile stated that the first he knew of the bank robbery was when he was interviewed by FBI agent Dennis Abarr on May 28, 1986. With regard to Hutton, Smile testified that she had strongly disliked him because of statements he made in the past to Bradley about her fidelity.

At the close of the state's evidence, Smile's trial counsel requested a judgment of acquittal on the basis that

Hutton was in the position of being an accomplice to Smile's alleged crime and thus her uncorroborated testimony was insufficient to convict Smile:

The testimony in this case that would in any way link Mr. Smile with the commission of the offense of accessory after the fact was the testimony of Ms. Kim Hutton. Ms. Hutton is I believe stands [sic] in the position of an accomplice to the offense of accessory after the fact. She, by her conduct, aided and assisted Donald Wayne Bradley to escape and conceal himself.

(Transcript of Evidence at 49.) The trial judge denied the motion for acquittal, ruling that the rule regarding the need for corroboration did not apply because Hutton was not an accomplice of Smile since she was a principal with Bradley in the robbery:

I don't believe she is an accessory after the fact. So I'm not going to charge the accomplice rule. I'm going to overrule your motion in that regard. You've got a neat little issue I guess to raise some other time.

(Tr. of Evid. at 57.)

Smile's motion for judgment of acquittal was renewed at the close of the evidence (Tr. of Evid. at 76). It was again denied, and in his instructions to the jury the judge gave no cautionary instruction regarding the reliability of the testimony of Hutton (Tr. of Evid. at 91-98). Following the instructions, defense counsel again objected, but this objection was overruled (Tr. of Evid. at 99-100).

Smile was found guilty by the jury and ultimately was sentenced to five

years' imprisonment. On appeal to both the Tennessee Court of Criminal Appeals and the Tennessee Supreme Court, Smile raised the issue regarding the unfairness of his conviction on the basis of uncorroborated accomplice testimony. The Court of Criminal Appeals ruled that the trial court did not err in refusing to give any accomplice instruction (A-10), and the Tennessee Supreme Court affirmed in a per curiam opinion.

ARGUMENT

THE PETITIONER WAS DENIED DUE PROCESS BECAUSE HE WAS CONVICTED ON THE BASIS OF UNCORROBORATED ACCOMPLICE TESTIMONY AFTER THE TRIAL COURT REFUSED TO INSTRUCT THE JURY REGARDING THE UNRELIABILITY OF SUCH TESTIMONY.

This case presents the issue of whether the fundamental fairness requirement of the due process provisions of the United States Constitution was met when the Petitioner, Fadel Smile, was convicted solely on the basis of the uncorroborated testimony of a participant in the crime for which he was indicted. Despite the fact that Kimberly Dawn Hutton admitted that she took part in the same acts for which Smile was charged, admitted being hostile towards Smile, and had a basis for wanting to cooperate with

state authorities since she had still faced the possibility of prosecution by the State, the trial court permitted her uncorroborated testimony to send Smile to prison for five years, without even cautioning the jury that her testimony might be suspect. Smile's conviction was thus obtained in violation of due process and of the principles established by this Court.

The Supreme Court has long recognized that the testimony of an accomplice which implicates a defendant is not to be accorded the same degree of credibility as testimony from a witness who did not participate in the crime. In Crawford v. United States, 212 U.S. 183, 203-04 (1909), this Court stated that the evidence of [a witness who

was involved in the crime] is not to be taken as that of an ordinary witness of good character in a case, whose testimony is generally and prima facie supposed to be correct. On the contrary, the evidence of such a witness ought to be received with suspicion, and with the very greatest care and caution, and ought not to be passed upon by the jury under the same rules governing other and apparently credible witnesses.

(Emphasis added.) More recently, the Court emphasized in Bruton v. United States, 391 U.S. 123, 136 (1968), that accomplice testimony is "inevitably suspect" and unreliable. Accord Cruz v. New York, 107 S. Ct. 1714, 1717 (1987).

Recognizing that accomplice testimony is inherently unreliable, courts have adopted various means by which to minimize the chance that a defendant would be convicted solely on the basis of such testimony. In many juris-

dictions, such as Tennessee, courts have adopted the rule that an accomplice's testimony cannot support a conviction unless some corroborating facts, entirely independent of that testimony, show that the crime was committed and that the defendant was involved. — See State v. Rucker, 712 S.W.2d 482 (Tenn. Crim. App. 1986). This rule requiring corroboration of an accomplice's testimony has not been adopted by the federal courts; instead, the federal courts of appeal have ruled that a conviction may rest on uncorroborated accomplice testimony, but where a prosecution presents such evidence, a defendant is entitled to cautionary instructions to the jury indicating that such testimony is not trustworthy and is to be treated with caution. See Annot., "Instructions--Accomplice Testimony," 17 A.L.R. Fed.

249 (1973), and cases cited therein.

Indeed, the courts have established that the failure to give such cautionary instructions in appropriate circumstances constitutes plain error and denies the fundamental fairness protected by the due process clause. For example, in United States v. Garcia, 528 F.2d 580 (5th Cir. 1976), cert. denied, 429 U.S. 898 (1976), the Fifth Circuit reversed the conviction of a defendant who had been convicted of drug charges solely on the uncorroborated testimony of one of the perpetrators of the crimes. Despite the fact that the defendant did not request cautionary instructions, and despite the fact that general instructions were given cautioning the jurors to take into consideration any circumstances which tended to shed light upon the credibility of the witnesses, the court

held that fundamental fairness required specific instructions regarding the accomplice's lack of credibility.

In Tillery v. United States, 411 F.2d 644 (5th Cir. 1969), the basis for the need for cautionary instructions was more thoroughly articulated. As the court correctly reasoned,

[b]ecause federal courts allow a conviction on the uncorroborated testimony of an accomplice, if not incredible or unsubstantial on its face, such testimony often constitutes the decisive influence in a jury's decision. Consequently, the jury must ponder the veracity of an accomplice's damaging testimony in its proper light. By failing to warn the jury about [the accomplice's] reliability in this case, the trial court presented the evidence to the jury in an improper perspective, and the jury may have felt bound to accept it as true.

Id. at 648 (emphasis added). Accordingly, the court reversed the defendant's conviction

for transporting stolen goods because the defendant's participation in the crime was alleged only by another perpetrator of the crime. Accord Williamson v. United States, 332 F.2d 123 (5th Cir. 1964) (embezzlement conviction resting solely on uncorroborated testimony of an accomplice reversed); see also United States v. Wasko, 473 F.2d 1282 (7th Cir. 1973) (trial court committed reversible error in failing to instruct jury regarding weight to be given to testimony of accomplice); United States v. Davis, 439 F.2d 1105 (9th Cir. 1971) (same); United States v. Evans, 398 F.2d 159 (3d Cir. 1968) (same); McMillen v. United States, 386 F.2d 29 (1st Cir. 1967), cert. denied, 390 U.S. 1031 (1968) (same).

These and many other cases demonstrate that the fundamental fairness component of

the due process clause is not satisfied when a defendant is convicted on the basis of the uncorroborated testimony of an accomplice and the jury has not been given cautionary instructions regarding the unreliability of such testimony. In the present case, however, the actions of the state trial court, and the failure of the Tennessee appellate courts to reverse the trial court, created exactly the due process violation condemned in all of the cases cited above.

The trial court created the due process violation by erroneously ruling that the witness who testified against Smile was not actually an accomplice, despite her claim of involvement with Smile in aiding in the escape of Bradley, the bank robber. This conclusion was reached by an erroneous reading of state cases discussing who is an accom-

plice, and by ignoring both the underlying reason for the rule requiring cautionary instructions and the well-established test for determining who is an accomplice for purposes of the rule. The opinion of the Tennessee Court of Appeals stated that Hutton was not an accomplice with Smile in assisting the flight of Bradley because, as an accessory after the fact, Smile could not have been an accomplice of Bradley. This illogical approach ignores the fact that Hutton could have been indicted as an accessory after the fact along with Smile, thus making her Smile's accomplice in that crime.

The state court decision is contrary to the vast majority of cases which have concluded that for purposes of evaluating accomplice testimony, an accomplice is simply someone who

is concerned in the commission of the specific crime with which the defendant is charged, Risinger v. United States, 236 F.2d 96 (5th Cir. 1956), or could be indicted or convicted of the identical offense for which the defendant is being prosecuted, Phelps v. United States, 252 F.2d 49 (5th Cir. 1958), Stephenson v. United States, 211 F.2d 702, 14 Alaska 603 (9th Cir. 1954), 2 Wharton, Criminal Evidence, § 448 at 230.

United States v. DeCicco, 424 F.2d 531, 532 (5th Cir. 1970); accord People of Territory of Guam v. Dela Rosa, 644 F.2d 1257 (9th Cir. 1980). As discussed above, Hutton was obviously concerned in the commission of the crime of accessory after the fact of the bank robbery, and could in fact have been indicted for the identical offense for which Smile was convicted.

Thus, the careful procedures which have been adopted by the courts to avoid unfair convictions based on uncorroborated testimony

of accomplices were circumvented in this case, allowing Smile to be sent to prison solely on the evidence of an accomplice.

While this Court has not yet directly addressed this important constitutional issue, it must be noted that the Court has indirectly underscored the constitutional dimensions of the failure to instruct the jury on the unreliability of accomplice testimony in Cash v. Culver, 358 U.S. 633 (1959), when it held that a new trial was required for a defendant who was tried without counsel. The case was decided prior to Gideon v. Wainwright, 372 U.S. 335 (1963), and thus the Court analyzed the case by looking at whether the particular state proceedings were apt to result in injustice so as to violate due process. The Court's determination that the fourteenth amendment may have

been violated, thus requiring an evidentiary hearing, was based largely on the fact that it appeared from the defendant's crude pro se habeas corpus petition that he had been convicted of burglary solely on the uncorroborated testimony of an accomplice. The Court noted that had the defendant had an attorney at trial, he could have ensured that the court gave an instruction, to which the defendant was entitled, that "the evidence of an accomplice should be received by the jury with great caution." Cash v. Culver, supra, 358 U.S. at 637 (quoting Varnum v. State, 137 Fla. 438, 188 So. 346 (1939)).

This case presents this Court with the opportunity to make clear the rule that uncorroborated testimony of an accomplice or coperpetrator of a crime cannot constitutionally be sufficient to convict a defendant

in the absence of cautionary instructions regarding the inherent unreliability of such testimony. The present case is an excellent case for the determination of the issue for, unlike many similar cases, Smile was clearly convicted solely on the accomplice's testimony; there was absolutely no other evidence linking Smile to the crime.

CONCLUSION

For all of the foregoing reasons, the Petitioner, Fadel Smile, requests this Court to grant his Petition for Writ of Certiorari.

Respectfully submitted,

Bob McD. Green
204 East Unaka Avenue
Johnson City, TN 37601
(615) 929-7169
Counsel of Record

John T. Milburn Rogers
100 South Main Street
Greenville, TN 37743
(615) 639-5183
Of Counsel

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APPENDIX

Bob McD. Green
204 East Unaka Avenue
Johnson City, TN 37601
(615) 928-6551
Counsel of Record

John T. Milburn Rogers
100 South Main Street
Greenville, TN 37743
(615) 639-5183
Of Counsel



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A P P E N D I X

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

STATE OF TENNESSEE,)

Appellee,)

V. CCA No. 816) SULLIVAN CRIMINAL

FADEL SMILE,)

Appellant)

O R D E R

Upon consideration of the application for permission to appeal and the entire record in this cause, the Court is of the opinion that the application should be denied.

PER CURIAM

IN THE COURT OF CRIMINAL APPEALS
OF TENNESSEE AT KNOXVILLE

SEPTEMBER 1988 SESSION

STATE OF) C.C.A. No. 816
TENNESSEE,)
Appellee,) Sullivan County
)
vs.) Hon. Edgar P. Calhoun,
) Presiding Judge
FADEL AL SMILE,)
Appellant.) (Accessory after the
Fact)

For the Appellant

At Trial:
James T. Bowman
305 North Road St.
Johnson City, TN
37601

On Appeal:
John T. Milburn
Rogers
100 South Main St.
Greeneville, TN
37743

For the Appellee

W.J. Michael Cody
Attorney General &
Recorder
450 James Robertson
Parkway
Nashville, TN
37219-5025

James W. Milam
Assistant Attorney
General
450 James Robertson
Parkway
Nashville, TN
37219-5025

Edward E. Wilson
Assistant District
Attorney General
Blountville, TN

Opinion Filed: May 2, 1989

AFFIRMED AS MODIFIED

JAMES C. BEASLEY
SPECIAL JUDGE

O P I N I O N

The defendant, Fadel Al Smile, appeals as of right from a judgment entered against him in the Criminal Court of Sullivan County finding him guilty as an accessory after the fact to bank robbery and fixing punishment at confinement for five (5) years plus a fine of \$500.00.

Issues raised here include: (1) a challenge to the sufficiency of the evidence; (2) a claim that the trial court erred in failing to declare witness Kim Hutton an accomplice and in failing to charge the jury on the necessity for corroboration of an accomplice's testimony; and (3) sentencing complaints.

For reasons hereinafter stated, we modify the judgment by striking the fine therefrom and as modified affirm the judgment of the trial court.

The proof shows that on March 5, 1985, the Twin City Federal Savings and Loan Association located in Sullivan County was robbed by a lone gunman. Kimberly Dawn Hutton testified that she was serving a three-year federal sentence for aiding and abetting Donald Gilbert Bradley in the commission of that offense. She provided him with a pistol and drove him to within two blocks of the Twin Savings and Loan where she waited for him in the car. After the robbery Mrs. Hutton drove Bradley to his grandfather's house in Bristol, Tennessee.

According to Mrs. Hutton, Bradley made several telephone calls and within less than an hour the defendant arrived at the grandfather's residence. Shortly thereafter, Hutton, Bradley and the defendant left in the defendant's car with

the defendant driving. They stopped at or near a bridge where they disposed of the gun used and clothing worn by Bradley during the robbery and then drove to the Empire Motor Lodge in Abingdon, Virginia. Hutton registered and she and Bradley were assigned room 273. The defendant remained at the motel for approximately forty-five minutes. Mrs. Hutton stated that she saw Bradley pay the defendant \$400.00 while they were at the motel. She also stated that while en route to Abingdon the robbery was discussed and other money was paid the defendant.

Records were introduced showing two long distance calls made from room 273 to the defendant's mother's home on March 5, 1985.

Certified copies of the court's minutes were introduced reflecting that on August 18, 1987, Donald Gilbert Brad-

ley entered a plea of guilty to bank robbery in Cause No. 21090 and was adjudged guilty of that offense.

F.B.I. Agent Dennis C. Abarr testified that in the course of investigating the bank robbery of the Twin City Federal Savings and Loan Association, he first talked with the defendant on March 18, 1986, Mr. Smile denied any knowledge of the robbery and in fact did not recall the incident. He admitted that during that period of time he had driven Bradley and Hutton to Abingdon but did not know the purpose of the trip. He had taken the couple to Abingdon several times.

During cross-examination of Agent Abarr, it was developed that subsequent to the Twin City robbery, Donald Gilbert Bradley committed a second bank robbery. The location or victim of the second offense was not established.

Testifying in his own behalf, the defendant denied any independent memory of a March 5, 1985, bank robbery. He did not recall driving Bradley and Hutton to Abingdon on that date but had given them several rides to several places including motels. The defendant denied receiving money from Bradley or discussing the robbery with him. He also denied hiding the gun.

In his challenge to the sufficiency of the convicting evidence, the defendant specifically charges that the State failed to prove beyond a reasonable doubt that the principal, Donald Gilbert Bradley, had been tried and convicted of the bank robbery of Twin City Federal Savings and Loan on March 5, 1985.

The offense of accessory after the fact is denied in T.C.A. Section 39-1-306 as follows:

A person who after the commission of a felony, harbors, conceals, or aids the offender, with the intent that he may avoid or escape from arrest, trial, conviction, or punishment, having knowledge or reasonable grounds to believe that such offender is liable to arrest, has been arrested, is indicted or has committed a felony, is an accessory after the fact.

This statute contemplates that in a separate trial of an accessory after the fact without his principal, it must be shown that his principal has been tried and convicted. Wilson v. State, 190 Tenn. 592, 230 S.W.2d 1014 (1950). The Court went on to point out that judgment must be entered on the verdict to make the record of the principal's conviction admissible.

When the State tendered a copy of the court's minutes reflecting only that on August 18, 1987, Donald Gilbert Bradley entered a plea of guilty to bank

robbery, the trial judge felt that the entry was not complete. He had the tape of the guilty plea proceedings played disclosing the following dialogue:

THE COURT: All right. How do you plead to bank robbery?

MR. BRADLEY: I'm guilty, I'm ashamed to say.

THE COURT: Upon your plea of guilty, it is the judgment of the Court that you're guilty of bank robbery and I'll defer sentencing until August 25th sometimes [sic] after 9:00 o'clock a.m. That will be all.

Then, without objection, the minute entry was corrected to reflect the entry of judgment finding Bradley guilty of bank robbery.

The Court's correction of the minute entry was immediately followed by an exchange between the assistant district attorney general and defense counsel, wherein it was stated:

GENERAL WILSON: As I understand it, that will be our last exhibit. We would file

that certified copy of the judgment showing that Mr. Bradley did plea [sic] guilty and was found guilty of the bank robbery of the Twin City Federal Savings and Loan that occurred on March 5, 1985. Is that fine?

MR. BOWMAN: That's fine. I will have some motions after they conclude.

Then in the presence of the jury the following occurred:

GENERAL WILSON: Your Honor, the State would move to file a certified copy of a judgment in Case 21090 that reflects on August the 18th, 1987, Defendant Donald Gilbert Bradley entered a plea to the bank robbery on March the 5th, 1985, of the Twin City Federal Savings and Loan Association, 1155 Volunteer Parkway, Bristol, Tennessee, and that upon entry of that plea the Court accepted that plea and found him guilty of that bank robbery.

THE COURT: All right.

In our opinion this record amply supports a finding by any rational trier of fact of all the essential elements of the crime, including the prior conviction of the principal felon, and the defendant's guilt thereof beyond a reasonable doubt. Rule 13(e), T.R.A.P.; Jackson v.

Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). This issue has no merit.

The defendant next contends that the State's witness, Kimberly Hutton, was an accomplice to the offense of accessory after the fact to bank robbery and that the trial court should have instructed the jury on the necessity for corroboration of an accomplice's testimony.

It is clearly established in this record that Kimberly Hutton aided and abetted in the commission of this bank robbery and was convicted of that offense. She is therefore deemed to be a principal offender. T.C.A. Section 39-1-303. The offense of accessory after the fact is a separate and distinct crime from that of a principal. State v. Hoosier, 631 S.W.2d 474 (Tenn. Crim. App. 1982). It is not an included offense of

the principal felony. State v. Norris,
684 S.W.2d 650 (Tenn. Crim. App. 1984).

In Tennessee, an accessory after the fact is not subject to indictment for the offense committed by his principal and thus under the generally accepted test an accessory after the fact could not be considered as an accomplice within the rule requiring that the testimony of an accomplice be corroborated. Monts v. State, 214 Tenn. 171, 379 S.W.2d 34 (1963). The trial court correctly held that Hutton and the defendant were not accomplices and the requested charge was properly refused.

In his first sentencing issue the defendant attacks the amended judgment entered by the trial court on November 23, 1987, in which the court sentenced him to five years confinement¹ in the

¹A fine of \$500.00 was also imposed.

Department of Correction as a Range I offender for an especially aggravated offense.

The trial court had originally sentenced the defendant to three years confinement² in the Department of Correction as a Range I standard offender. Although the State's notice of enhanced punishment alleged that the defendant was on parole at the time he committed the instant offense and with documents showing the date of his discharge from parole as August 15, 1985, both the assistant district attorney general and the trial judge expressed the obviously erroneous belief that defendant's parole had expired prior to the commission of the present offense (3-4-85). Thus the Range I sentence.

On October 21, 1987, the State filed

²A fine of \$500.00 was also imposed.

a motion to amend sentence on the grounds that the defendant had been on parole at the time he committed the present offense. The defendant's motion for new trial which included an attack against the original sentence was filed on October 27, 1987. A hearing was held on both motions on November 23, 1987, after which the trial court overruled the motion for a new trial but amended the defendant's term of confinement to five years as a Range I offender for an aggravated offense committed while on parole.

Once the judgment becomes final in the trial court, such court shall have no jurisdiction or authority to change the sentence in any manner. T.C.A. Section 40-35-315(b). The judgment becomes final thirty days after its entry in the absence of some procedural action to delay

its efficacy. Ray v. State, 576 S.W.2d 598 (Tenn. Crim. App. 1978). See also State v. Bouchard, 563 S.W.2d 561 (Tenn. Crim. App. 1977).

Clearly, under the facts present here the judgment had not become final and the trial judge was well within his authority to change the sentence on timely filed motion of either the State or the defendant.

Both the State and the defendant filed post-judgment motions within thirty days seeking changes in the sentence. Thus the sentence judgment had not become final and was subject to change by the trial judge.

The defendant also says that the mitigating and enhancement factors were not weighed properly and claims that the sentence is excessive.

We are therefore required by T.C.A.

Section 40-35-402(d) to conduct a de novo review on the record without indulging in any presumption that the sentencing decisions of the trial judge were proper.

As heretofore noted, the defendant was subject to a Range I sentence for the commission of an especially aggravated offense in that he was a parole [sic] from prior felony convictions at the time he committed the instant offense. T.C.A.

Section 40-35-107.

All accessories after the fact shall on conviction thereof be imprisoned in the penitentiary not exceeding five (5) years; or in the county workhouse or jail not exceeding one (1) year or by a fine not exceeding One Thousand Dollars (\$1,000.00) or by both in the discretion of the court; provided that in no case shall his punishment be greater than the maximum provided by law for the principal

offender. T.C.A. Section 39-1-307.

As a Range I offender the sentencing range for the defendant was a minimum of three (3) years and a maximum five (5) years.

The record reflects that the 25-year-old defendant did poorly in school but seems to have maintained regular employment since 1984. At the time of his sentencing hearing the defendant was a partner and actively engaged in operating Smile Communications Systems, Inc. Applicable statutory mitigating factors that the defendant's conduct neither caused nor threatened serious bodily injury and that the defendant did not contemplate that his criminal conduct would cause or threaten serious bodily injury were also noted by the trial judge.

On the other hand, the defendant has

an extensive history of drug offenses, both as a juvenile and as an adult. At the early age of twelve he served nine months at a juvenile center for selling marijuana. In 1979 he was fined and required to do community service work for shoplifting. The next year the defendant received a fine in General Sessions Court for possessing marijuana. Three felony drug convictions in 1981 resulted in penitentiary sentences totaling not less than four (4) nor more than seven (7) years from which the defendant was on parole at the time he committed the instant offense. As observed by the trial judge, probation and parole had had little effect on this defendant. Apparently, prior incarceration has failed to instill in this defendant a respect for the law and a willingness to obey its mandates.

Less restrictive measures having failed, we see no alternative to the imposition of the maximum term of imprisonment for this defendant for this offense.

While we affirm that portion of the judgment fixing confinement in the Department of Correction for a period of five (5) years, we are of the opinion that the fine was unauthorized by law and must be stricken.

As heretofore noted, the punishment fixed by statute for an accessory after the fact is either by (1) a penitentiary sentence of up to five (5) years or (2) a fine and/or confinement in the county jail or workhouse. Where, as here, the sentence is to the penitentiary, a fine is not permitted under this statute. See Taylor v. State, 212 Tenn. 187, 369 S.W.2d 385 (1963).

As modified, the judgment is af
firmed.

s/James C. Beasley, Special Judge

Concur:

s/Joe D. Duncan, Presiding Judge

s/John K. Byers, Judge

